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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213709
Party	Defendant Turner, Nicholas
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Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

CHERRY RED RECORDS, Opposer, v. NICHOLAS TURNER, Applicant.	Opposition No. 91213709 Serial No. 85776225 Mark: NIK TURNER'S HAWKWIND

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Applicant, Nicholas Turner ("Turner"), files this Motion to Dismiss Opposer, Cherry Red Records' ("Cherry Red") Opposition to Turner's Application, under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.

INTRODUCTION

The Opposition of Cherry Red should be dismissed with prejudice and without leave to amend under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Cherry Red does not have standing to oppose this application because (1) Cherry Red has no real interest in this proceeding, and (2) Cherry Red has no "reasonable" basis for believing that it would be

adversely affected by, or incur damages as a result of, the registration of Turner's mark.

II.

STATEMENT OF FACTS

This proceeding involves the musical group Hawkwind, which is well known in the "progressive rock" genre. Hawkwind was formed in the United Kingdom in late 1969, with Turner being among the original members. "Hawkwind" was a nickname given to Turner by the rest of the band, and the nickname became the name of the group. Turner remained with the group until 1976, and also was a member of the group in the 1980s. Turner's name is still associated with what many fans consider Hawkwind's most important period, and, at various times in the past, Turner has performed in the United States as "Nik Turner's Hawkwind." On November 9, 2012, Turned filed Application Serial No. 85776225 for NIK TURNER'S HAWKWIND in International Class 41 for "Entertainment services, namely, live musical performances by an individual or musical group." Turner does not perform as HAWKWIND, nor does he manufacture or authorize the manufacture of goods bearing the HAWKWIND mark.

The application was filed on October 29, 2013. Three parties have filed oppositions to the application: (1) Cherry Red, a record company based

in the United Kingdom; (2) 4Worlds Media Ltd, another UK record label, which states that it is the "current label" of Hawkwind (Opposition No. 91214236); and (3) Dave Brock ("Brock"), another original member of Hawkwind, who styles himself as the "leader" of the current incarnation of the band (Opposition No. 91214199). Brock's Hawkwind has not toured in the United States since 1997 (other than an appearance at one music festival in Pennsylvania in 2007), because several criminal convictions have prevented Brock from securing a work visa for entry into the United States. Turner, by comparison, recently completed a lengthy tour of the United States, performing Hawkwind material.

On November 27, 2013, Cherry Red filed its Notice of Opposition, with the sole grounds being "[c]onfusion with existing artist using the name," and included the following statement set forth on Cherry Red's letterhead: "Cherry Red Records have a license from Dave Brock to use the trademark HAWKWIND worldwide and to market HAWKWIND records, DVDs and CDs. If any other trademark incorporating the word Hawkwind in any form is approved in the US it would cause confusion and detract from the HAWKWIND trademark."

III.

STANDARD OF REVIEW

Cherry Red's opposition should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. While courts liberally construe complaints, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v Twombly*, 127 S. Ct. 1955, 1964 (2007). As set forth below, Cherry Red's opposition sets forth no facts regarding its standing to oppose this application.

IV.

ARGUMENT

Section 13 of the Trademark Act provides, in relevant part, that "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register, … may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefore…" To assess the requisite showing under the statute, a two-part, judicially-created test requires that opposer must have: (1) a "real interest" in the proceedings and (2) a "reasonable" basis for his belief of damage.

Ritchie v. Simpson, 170 F.3d 1092, 1095, 50 U.S.P.Q. 2d 1023, 1095 (Fed. Cir. 1999).

In its Notice of Opposition, Cherry Red provides a scant few words about why it believes it would be damaged. Cherry Red is a record company that releases Hawkwind recordings. That is all. Cherry Red is not in the business of providing live performances of music (either in the UK or in the United States), and Turner is not in the business of manufacturing phonorecords containing Hawkwind recordings. Because Turner is not manufacturing Hawkwind phonorecords, Cherry Red's belief that Turner's mark will "detract" from the Hawkwind name is not reasonable; in fact the opposite is true. It could be more easily argued that Turner's mark, and his live performances utilizing NIK TURNER'S HAWKWIND, will *promote* Cherry Red's catalogue of recordings.[1] The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties. *Lipton Industries, Inc. v. Ralston Purina Co*., 670 F.2d 1024, 213 U.S.P.Q. 185, 189 (C.C.P.A 1982).

[1] Although it might be beyond the scope of this motion, the fact is that Turner not only promotes Hawkwind's music though his performances, he actually sells Cherry Red's products on his tour, *which are knowingly supplied by Cherry Red.* However, for purposes of this motion, it is enough to note that Cherry Red's opposition does not allege that Turner competes with Cherry Red in the manufacture of Hawkwind phonorecords.

Because Turner and Cherry Red are not in competition, and Cherry Red's belief of possible damage is neither rational nor reasonable, this opposition should be dismissed. Indeed, because opposer Brock does have standing, this matter will be litigated fully. The resources of the parties, and the TTAB, should not be squandered litigating the opposition of record labels that have no reasonable belief that they could be damaged by Turner's use of his mark.

V.

CONCLUSION

Cherry Red has failed to plead any valid reason why it would have standing to oppose Turner's application, and his opposition should be dismissed without leave to amend.

Respectfully submitted,

Dated: January 6, 2014

By: */s/ Evan S. Cohen*

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CERTIFICATE OF SERVICE

Applicant Nicholas Turner, by and through his attorney, hereby certifies that a copy of this MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM has been served on Opposer on this 6th day of January 2014, by mailing a true and correct copy via First-Class Mail International to the following address:

Matt Bristow
Director
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UNITED KINDOM

/Evan S. Cohen/
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NICHOLAS TURNER